IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 118

CHAIN O'MINES, A CORPORATION, ET. AL.,
Petitioners,

vs.

UNITED GILPIN CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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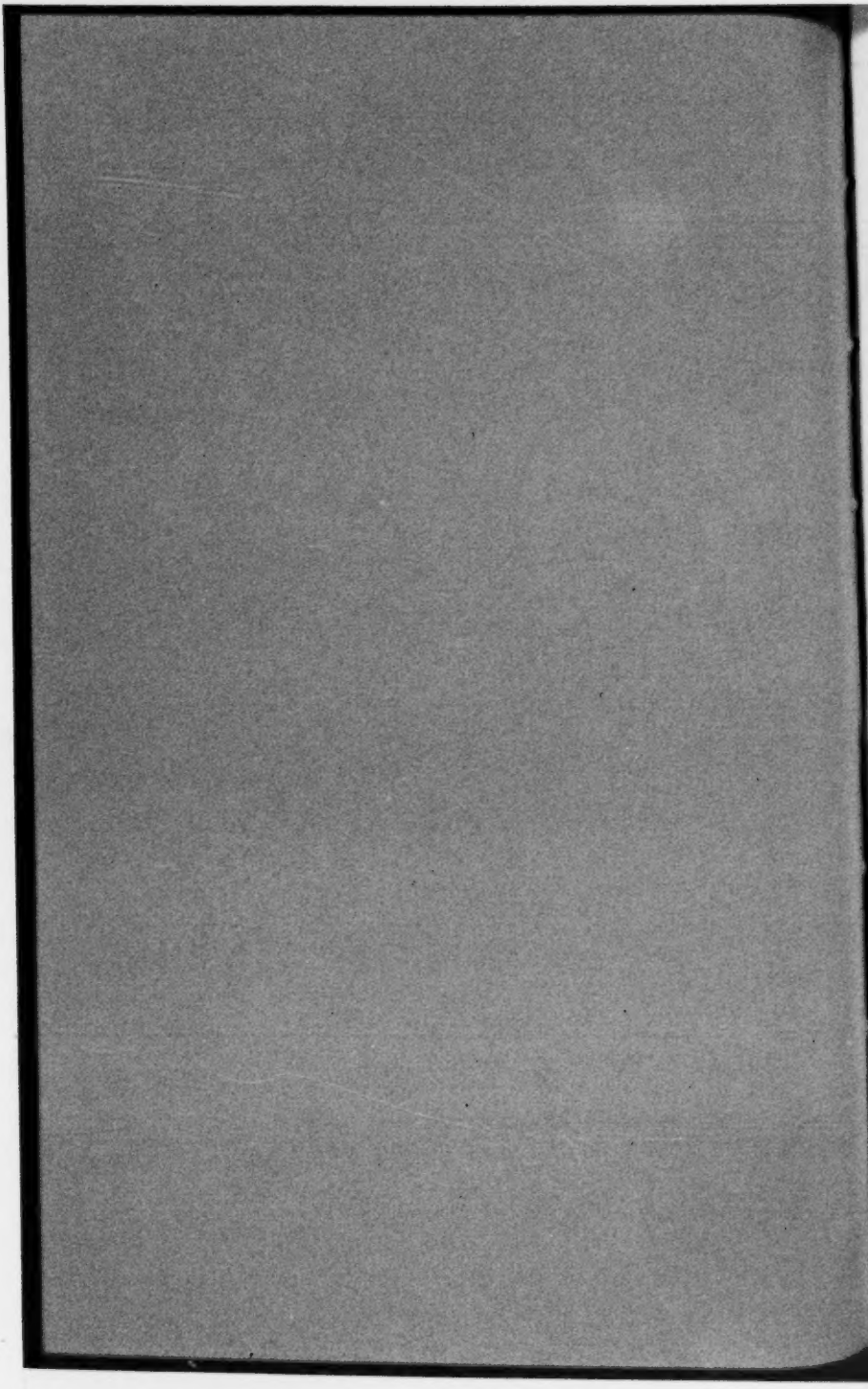

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ANSWER AND BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents urge that the Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Jurisdiction.

We concede the jurisdiction of this Court under the Certiorari Act to *entertain* a petition for Writ of Certiorari in this case.

Exercise of Jurisdiction.

But we contend that the case at bar presents no circumstances that warrant the grant of Certiorari in this cause since the petition shows that the petitioners are simply seeking "*another hearing*" (*Magnum Co.* v. *Coty*, 262 U. S. 159, 163).

Reasons Urged in Petition for Writ of Certiorari to Review the Decree and Judgment of the Circuit Court of Appeals in Favor of the Respondents.

Petition at pages 3-5 does not clearly separate the grounds upon which they contend that a Writ of Certiorari should be granted. Under the three separate headings entitled "Basis of Jurisdiction" (p. 3), "Questions Presented" (4) and "Reasons Relied on for the Allowance of the Writ" (4-5), petitioners "mingle" several contentions that we take as the reasons relied on by petitioners for the allowance of the Writ. Roughly grouping them, they are:

1. The contention that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision (This is B, p. 3, and No. 7, p. 5).

2. The contention that the Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the weight of authority (This is C, at p. 3).

[This contention is immediately disposed of by pointing out that since the decision of this Court in *Erie R. R.* v. *Tompkins*, 304 U. S. 64, 78, this "ground" for granting Certiorari is no longer applicable. The amendment by this Court of Rule 38, paragraph 5, b, as of February 27, 1939, recognizes that there no longer is any ground for granting

Certiorari to review the decision of a federal Circuit Court of Appeals on the alleged ground that the decision of "Federal" general law, is in conflict with the weight of authority].

3. The contention that the Circuit Court of Appeals has decided a question of local law in a way in conflict with applicable local decisions (This is D at p. 3, and probably includes most of the "Reasons" at pp. 4-5. This is probably this ground upon which petitioners most strongly rely).

4. The contention that the Circuit Court of Appeals did not have the right to review the evidence and reverse the findings of fact of the District Court (This is 1 under Questions Presented at p. 4).

5. The contention that the decision of the Circuit Court of Appeals on the particular facts is erroneous on the merits (This is 2 and 3 under Questions Presented at 4, and Nos. 1, 2, 3, 5, 6 and 7 on pp. 4 and 5 under Reasons Relied On).

6. The contention that the decision of the Circuit Court of Appeals is in conflict with a decision of the same Court on the same question or matter herein involved (This is No. 4 in Reasons relied on at p. 4).

We contend: that ALL of the aforesaid petitioners' reasons when analyzed and even if considered in the light of the argument advanced in petitioners' brief, simply amounts to a contention that a Writ of Certiorari should be granted in *this* case on the ground that the Circuit Court of Appeals erred on the merits of the particular controversy between the parties.

In answer we say:

The certiorari jurisdiction of this Court is not exercised in such a case to grant another hearing to petitioners.

The Reasons for not Reviewing by Certiorari the Merits of a Particular Case.

1. Granting of a Writ of Certiorari is *not* warranted merely to review the evidence or the inferences to be drawn from it.

In *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U. S. 175 Justice Butler said in reference to granting certiorari, under Rule 38 (5, b) of this court:

> "Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would *not* be warranted merely *to review the evidence or inferences to be drawn from it.*" (Italics ours.)
>
> 304 U. S. at 178 (aff'd on rehearing 305 U. S. 124).

To the same effect:

> *Southern Power Co.* v. *North Carolina Public Service Commission*, 263 U. S. 508, 509;
> *United States* v. *Johnson*, 268 U. S. 220, 227;
> *New York Central* v. *Kinney*, 260 U. S. 340, 345;
> *Houston Oil* v. *Goodrich*, 245 U. S. 440.

The rationale implicit in the exercise of Certiorari jurisdiction by this Court within the meaning of the standards set by Rule 38 (5, b) of this court, as formulated by Mr. Justice Roberts in his dissenting opinion in *Deputy* v. *DuPont*, 84 Lawyers Ed. 314 at 320 (1940), is authority for our statement that to grant Certiorari in a case such as the one now before this Court would be to impair the effectiveness of this Court in the federal judicial system. To grant Certiorari in this case would amount to giving the petitioners, the defeated party in the Circuit Court of Appeals, a *further hearing.* This, of course, was not the intention or the purpose of the Certiorari act. (Taft C. J. in *Magnum Co.* v. *Coty*, 262 U. S. 159, at 163.)

In the case at bar both the petition for certiorari and the brief disclose that the principles of law involved are not in controversy, and that the Writ is sought merely to obtain review of the decision by the Circuit Court of Appeals in applying well settled principles of Illinois law on the narrow ground that the Court erred in determining issues that were peculiar to the facts of the particular case by its application of these well settled principles of law to these particular facts. This Court has repeatedly held that it will not use the Certiorari Act for such purpose.

See 53 Harvard Law Review 579 at 595 and the many authorities therein cited in approval of this Court's interpretation of the Certiorari Act.

Let us assume that Rule 38 (5, b) of this court "illustrating" exercise of certiorari jurisdiction by this Court applies to the facts of the case at bar.

Even then respondents contend that on the facts of the particular case before it the decision of the Circuit Court of Appeals on the merits was and is correct, and should be sustained by this Court by the denial of petition for certiorari.

Scope of Review on an Equity Appeal.

First, we dispose of petitioners' contention that the Circuit Court of Appeals did not have "the right to review the evidence and reverse the findings of fact of the District Court" (p. 4).

This was an appeal in an equity proceeding.

The Circuit Court of Appeals on an equity appeal from the District Court decree not only had the *power* but was under the *duty* of reviewing the facts *de novo* and in entering such decree as the Court of first instance *ought* to have

made even though the Court of Appeals gave proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.

Keller v. *Potomac Electric Co.*, 261 U. S. 428, 443-444

states the rule upon an "equity" appeal to be:

> "In that procedure (equity) an appeal brings up the whole record and the Appellate Court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of facts which should be accorded to a tribunal which heard the witnesses."

This Court has repeatedly held that on an equity appeal the *facts* as well as the law are reviewable, and if the findings of the trial court are against the weight of the evidence, the Circuit Court of Appeals should reverse such findings.

Morley v. *Md. Casualty Co.*, 300 U. S. 185, 191;
Virginian Railway v. *U. S.*, 272 U. S. 658, 675;
Cincinnatti v. *C. & H. Traction Co.*, 245 U. S. 446, 454;
Dower v. *Richards*, 151 U. S. 658, 663-664;
Dodge v. *Knowles*, 114 U. S. 430, 434;
Wiscart v. *D'Auchy*, 3 Dallas 321, 327.

In accordance with this rule, the Circuit Court of Appeals considered the facts in the record as well as the law, and entered a decree in favor of the respondents. This practice was in accord with previous decisions of the same Circuit, namely,

Uihlein v. *General Electric Co.*, 47 Fed. (2d) 997, 1002 (cited by the Court, R. 1142);

American Central Insurance Co. v. *Harmon Mills,* 39 Fed. (2d) 21, 24;
American Rotary Valve v. *Moorehead,* 226 Fed. 202, 203.

This practice of the Circuit Court of Appeals for the Seventh Circuit on an equity appeal is in accord with the practice in other circuits. See

Hopkins v. *Texas Co.,* 62 Fed. (2d) 691, (C. C. A. 10, Cert. denied, 290 U. S. 629);
Aro Equipment Co. v. *Harry Wissler,* 84 Fed. (2d) 619, (C. C. A. 8);
Sapulpa Petroleum v. *McCrary,* 4 Fed. (2nd) 645 (where C. C. A. 4 reverses finding of facts by Chancellor; cert. denied 269 U. S. 561).
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The Merits.

Did the Circuit Court of Appeals correctly review the evidence and apply the "applicable" Illinois law?

Respondents say that the Circuit Court of Appeals rendered the correct decision on the merits. We defer discussion of the merits to our brief, *infra.*

For reasons of conciseness and to avoid duplication we also defer to our brief the discussion of suggestion made by petitioners that the decision of the Circuit Court of Appeals was a decision on a question of local law in a way in conflict with applicable local decisions.

Summary Statement of Matter Involved.

Petitioners' summary statement (p. 2) is inadequate. The opinion of the Circuit Court of Appeals discloses a lengthy chronological outline summary (R. 1133) of extremely complicated facts (R. 1134).

Petitioners' summary attempts to single out one fact, namely, the contract of June 19, 1934, as the basis of their entire law suit. This is inaccurate, for the "law suit" was based on the entire evidence as shown by the two volumes of evidence.

An adequate summary statement is as follows:

Chain O'Mines Corporation, organized in 1929, operated certain gold mining properties in the State of Colorado. Operations were a financial loss from the outset. William Muchow, the corporate president, and originally the promoter, attempted various legal plans or devices for either operating the property through his own syndicate or selling the property to third persons. This included approaching Kremm, one of the respondents, in 1933 and asking for his assistance in selling the property. Kremm attempted both to raise money for the operation of the properties and to sell the properties. All attempts were unsuccessful. By the winter of 1933 Chain O'Mines was financially wrecked. The property was being sold for taxes. Liens had accumulated in the sum of $97,000 for labor and electric light power liens and approximately $25,000 for various other judgments that had been taken against it (Rec. 879-880).

In the late winter of 1934 Muchow again approached Kremm for assistance and financial help. Kremm gave both. On March 17, 1934, the labor and power lien suits culminated in a decree whereby the lienors would be entitled to a deed to the property upon sale under a decree of foreclosure finding the liens to amount to approximately $97,000. Kremm, at the insistence of Muchow and the directors of the Chain O'Mines, attempted to work out some agreement with the owners of the lien decree. In May, 1934, Kremm obtained offers to sell such liens under a contract of sale. Kremm attempted to raise money from the stockholders of Chain O'Mines to purchase these liens

or decree but could not even raise the sum of $1,000. Kremm then interested Schwerin, one of the respondents, in advancing some cash as an investment for the purpose of seeing whether or not the mines could be profitably operated and the labor liens paid off from such operations. It was at that time that the contract of June 19, 1934, was executed by Seeley, one of the respondents. Operations of the mine were commenced and continued under varying individuals or corporations. Schwerin and his associates kept on advancing cash and making various loans from June, 1934, for the operation of the properties up until the institution of the suit by the petitioners in the Federal District Court in November, 1937. There were approximately five separate attempts by Schwerin and his associates to profitably operate the mines, including the attempts by an independent engineering corporation from Cleveland. None of these attempts were financially successful. All of the operations lost money. Schwerin and his associates had kept on putting additional moneys into the operations and attempting to secure security for such loans against the properties. On the basis of the foregoing facts petitioners started suit in November, 1937.

The trial court found that Scherwin and his associates had on May 8, 1934, entered into a fraudulent scheme and conspiracy to deprive the Chain O'Mines and its stockholders of its property without paying any compensation for it; that all acts by the respondents subsequent to the said date were part of the fraudulent scheme and conspiracy (R. 1054, 1055). The Circuit Court of Appeals reviewed and considered all the evidence, and found that the Chain O'Mines was financially wrecked when the respondents came into the picture (R. 1141); that the respondents advanced money in an attempt to profitably operate the mine; that this gold mine, as in the case of other gold mines, resulted in the loss of money to those operating and investing; that the facts of operation show the honesty

and good faith of the respondents even though they continued to lose money; that they had advanced money and became more and more involved each year; that in protecting their loans and investments the respondents were within their legal rights, and were not guilty of fraud; that all the evidence measured in the light of the decisions of the Illinois Supreme Court with regard to the proof of a constructive trust by clear, convincing, unequivocal and unmistakable evidence (R. 1141) required that the trial court's decree should be reversed with directions to dismiss the suit.

The District Court did *not* rely upon the construction of the contract as the basis for finding fraud. The Circuit Court of Appeals did *not* rely upon the interpretation of the contract as the basis for not finding fraud, nor did it rely upon the unprofitableness of the venture as the ground for not finding fraud.

The petitioners' theory at the trial was that the defendants were guilty of actual fraud for which equity would impose a constructive trust, and that the petitioners were entitled to a return of all of the properties without any deductions or reimbursements to the respondents, and were entitled to an accounting of the moneys for the ore mined while the respondents were operating the mine. These theories were the ones relied on by petitioners in the Circuit Court of Appeals. Even in petitioners' petition for rehearing in the Circuit Court of Appeals they did *not* ask the Circuit Court of Appeals to grant the petitioners "some" equitable relief, they repeated their contentions made in the trial court and asked that the decree of the District Court should be *affirmed* (R. 1171).

BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

It is doubtful whether the memorandum opinion of the District Court (R. 1049, 1053) relied on so strongly by petitioners will be considered by this Court in place of the findings of fact and conclusions of law made by the trial court (R. 1054, 1076, 1089, 1090) (*Inter-State Circuit, Inc.* v. *United States,* 304 U. S. 455, 456, 457; *Railway Commission* v. *Maxey,* 281 U. S. 82, 83).

If the memorandum is so considered it is significant that the District Court was apparently not certain of his findings, because he expressly stated that he suggested that counsel consider whether they could not settle the case. He stated he was moved to that suggestion by his belief that the values involved were not nearly as great as the aggregate of the moneys that had been invested, and that it would be better for all concerned to devote their energies to developing the property rather than to fighting among themselves (R. 1053). A suggestion of compromise in a case where the trial court has stamped the defendants guilty of fraud seems illogical and inconsistent. In addition, this proves that the gold mining properties are not the valuable properties as claimed by petitioners throughout their brief.

The opinion of the Circuit Court of Appeals is reported in 109 Fed. (2nd) 617 and is printed in the record and filed herein (Rec. 1134-1143).

STATEMENT OF THE CASE.

Questions Open Under the Petition.

In the petitioners' petition for certiorari—as distinguished from their brief in support—petitioners do not state that they desire to have the decree of the Circuit Court of Appeals *modified* as distinguished from reversed. In their brief, petitioners may be said by implication and by inferential argument to contend that the Court of Appeals should have directed a modification of the District Court decree instead of reversing it.

Petitioners' pleadings indicate that although they started out on a theory of specific performance of the contract of June 19, 1934, (see prayers for relief in paragraphs 1, 2 and 5 in R. 18 and 19) at and during the trial they definitely *changed* their theories by substituting in place of *such* prayers for relief prayers based upon *findings of actual fraud* (see R. 73, 75).

This change to fraud was in accord with the theory and rulings of the trial court (see R. 1042).

In the Circuit Court of Appeals the petitioners relied solely upon the theory that the trial court's decree finding fraud should be sustained. They did not ask for *any other* relief or ruling from the Circuit Court of Appeals. Even after the opinion reversing the trial court had been filed in the Circuit Court of Appeals, petitioners' petition for rehearing indicates that the petitioners still adhered to their theory that the decree of the District Court should be *affirmed* (R. 1171). They did not ask for any *modification* of the decree reversing and remanding with directions to dismiss the suit.

It is fundamental that questions not raised in the Circuit Court of Appeals will not be considered by this Court on certiorari.

Parties should not be permitted to try their case on one theory "below" and then switch to a different theory in a reviewing court.

Also, it is well settled that only those *questions* raised in the petition for certiorari will be considered by this Court; the questions raised in the brief in support of the petition for certiorari will not be open to petitioners in this Court.

Under the recent decision in *General Talking Pictures Corp.* v. *Western Electric Co., et al,* 304 U. S. 175, 178, a statement of points in the supporting brief does not *expand* or add to the questions stated in the petition. It was held that this Court's consideration of alleged errors must be limited to the grounds raised in his certiorari petition. See also:

Clark v. *Williard,* 294 U. S. 211, 216;
Helvering v. *Taylor,* 293 U. S. 507, 511;
Washington Coach Co. v. *Labor Board,* 301 U. S. 142-146.

In addition, the fact that this point was not raised in the Circuit Court of Appeals precludes the petitioners from raising this contention in this Court.

The several answers of the respondents (R. 25-66) set out in detail the facts relied on by the respondents for their defenses in the trial court. Long prior to the trial the petitioners were informed of the facts upon which the defendants claimed that the petitioners had no cause of action. The evidence offered by the petitioners at the trial in the District Court was offered with full knowledge of the facts and theories relied on by the respondents in their defense. It was on all this testimony that the Circuit Court of Appeals ruled that the petitioners had failed to make out a case of fraud within the meaning of the Illinois authorities.

The Facts.

The opinion of the Circuit Court of Appeals presents an outlined summary of the facts as made by that Court after reading of a record comprising 1,129 pages. This summary constitutes several pages, including voluminous footnotes. But the petitioners in their brief merely attempt to state *some* of the *conflicting* facts in approximately six pages. This inadequate statement of facts is highly insufficient to properly present the issues of fact and law raised by the record.

This Court in reviewing the decision of the Circuit Court of Appeals will recognize that the said Court had the power to consider the facts *de novo,* and to enter such decree as warranted and required by equity and justice as the *entire record.* The petitioners seek to "pick and choose" certain bits of testimony upon which they rely in their attempt to make the findings of the Circuit Court of Appeals appear to be contrary to the manifest weight of the evidence. This Court in an analogous situation has pointed out that a Court would not be warranted in picking and choosing bits of evidence for the purpose of making findings of fact contrary to the findings of the fact-finding body, *i. e.,* the Federal Trade Commission, *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 116, 117.

Under the rules of this Court it is not our function in the answer to the petition to argue the merits of the case at great length. Yet, nevertheless, we feel that it is our duty to briefly discuss the merits, and that such brief discussion will clearly indicate to this Court the decision of the Circuit Court of Appeals on the merits *was* correct. The merits cannot be discussed unless an adequate statement of facts is presented.

With regard to an adequate statement of facts, the Circuit Court of Appeals in its opinion stated that "The facts are most complicated" (R. 1134). Our answer to the

petition for rehearing in the Circuit Court of Appeal shows that in our original brief in the Circuit Court of Appeals such a complete and fair statement of essential facts occupied pages 9 to 48 of that brief (See Rec. 1178, 1180, 1181). It was upon this exhaustive treatment of the facts that the Circuit Court of Appeals made its outline of the essential facts and came to its conclusion. It is not our desire to state the facts in similar detail in this court because it would unduly burden this brief and this Court.

Consequently, we shall only state the facts surrounding the drawing up of the so-called contract of June 19, 1934. This will be a good illustration of the nature of the testimony in the record that would apply to other important issues of fact—such as the operation of the mines, the obtaining of security interests, by respondents for moneys advanced, the cancellation of the Lewison contract, the obtaining of the tax titles, and all of the other essential issues of fact which the Circuit Court of Appeals held indicated the good faith of the respondents.

In addition this "background" is essential to an understanding of all events subsequently occurring.

SUMMARY OF LEADING FACTS.

1. Background of Chain O'Mines to June 19, 1934.

(a) Organization of Chain O'Mines.

Chain O'Mines, Inc., a corporation (hereinafter referred to as plaintiff) was organized by Dr. Wm. Muchow, an individual engaged in mining operations, under the laws of Nevada in 1929. It became the owner of approximately 1100 gold mining claims located in Gilpin County, Colorado. See Maps, Plaintiffs' Exhibits 37, 38 and 39 (R. 361-368). It began to operate these gold mines by means of capital raised from its stockholders. Later it raised additional money through a bond issue secured by a mortgage in the sum of $300,000.00 dated June 15, 1932 and due June 15, 1934 (R. 298).

By 1932 the operation of the gold mines proved to be unprofitable. From that time on the plaintiff was in serious financial difficulties (R. 260).

(b) Financial difficulties Chain O'Mines, 1932. Kremm assists Chain O'Mines and others.

In the summer of 1932 (R. 260) Defendant Kremm, a business man who had considerable experience in banks and in the financing and reorganization business, was approached by various individuals including Attorney Meyer and Mr. Dyche, business manager of N. W. University, on behalf of the plaintiff, who attempted to interest him in the "reforming" of the plaintiffs' gold mining properties (R. 932). In the latter part of 1932, Dr. Wm. M. Muchow, who owned 200,000 shares of stock in the Plaintiff Corporation (R. 374) and Miss Avis Hart, the secretary to Dr. Muchow, came to see Kremm at his office and they asked him to assist the Plaintiff Corporation out of its financial difficulties. Kremm purchased 50 shares of stock in the Plaintiff Corporation about December, 1932 (R. 212). Kremm talked to some of the important stockholders in the Plaintiff Corporation. The names of these stockholders were furnished by Dr. Muchow. Muchow brought Mr. Banks to Kremm's office and introduced him as the largest stockholder. He also brought a Mr. Appleton. Discussion was had between Defendant Kremm and Messrs. Appleton and Banks wherein the stockholders offered to support him by giving up one-half their interest, or any other thing that could be done because the Corporation was in grave difficulties; there was internal dissension and something had to be done. Kremm studied the situation (R. 932-933).

Subsequently numerous discussions concerning the property and the financial difficulties were had between Muchow, Kremm and various other stockholders of the plaintiff

(R. 260). Muchow then suggested the sale of the property for the sum of one and one-half million dollars, and offered to pay Kremm 10% commission (R. 371-372, 933). Kremm thereupon attempted to sell the properties to various individuals in the mining business, and also attempted to sell this property in England. Kremm furnished this English broker with material to push the sale of the properties including moving picture films of the properties furnished by Muchow and Hart. These negotiations were unsuccessful and negotiations fell through (R. 933-934).

During the months of November and December, 1932, Kremm had loaned various sums of money to the plaintiff. On or about January 19, 1933, either Dr. Muchow or Miss Hart again came to Kremm's office and requested more money. They persuaded him to purchase stock and he did, giving $60.00 for the shares of stock (R. 212, 935).

In the early part of 1933, Kremm and Muchow went to Central City, Colorado, to inspect the gold mining properties of the plaintiff (R. 260). Muchow had informed Kremm that the situation in Central City had become very serious and that Kremm should be personally acquainted with the physical property in order to be able to obtain results in helping the Plaintiff Corporation (R. 935).

At that time there were certain labor claim difficulties at the mines, and a conference was had between Kremm, Muchow, the superintendent of the mines and Herbert Munroe, the Colorado attorney for the Plaintiff Corporation (R. 936).

On Kremm's return to Chicago there was a meeting of some of the directors of the plaintiff and Kremm reported what had occurred in Colorado. He was then asked to gain indulgences from the corporate creditors. Kremm called on several of the creditors in Chicago and also had conferences with creditors from Denver (R. 936). At that

time Kremm was devoting himself to plans for the sale of the property.

When the plans for the sale of the property fell through, other plans for the refinancing or reconstruction of the properties were considered. One of these was called a Reconstruction Plan which required the raising of money from the stockholders and participation by the creditors. Miss Hart circularized the entire creditor list which included approximately one hundred creditors outside of the laborers. Kremm talked to various stockholders about this plan. No money was raised under this plan (R. 937).

Kremm became a director of Chain O'Mines in February, 1933. He did so because of the argument by Dr. Muchow and Miss Hart that if he were a board member, it would assist him in dealing with the creditors. He was director until April, 1933 (R. 260). During the time Kremm was director the financial difficulties of the Plaintiff Corporation were discussed, and various attempts were made to work out other methods or means by which the operation of the mines could be continued. These plans fell through (R. 260-261).

Subsequent to Kremm's resignation from the Board of Directors of the Plaintiff Corporation, in April, 1933, he was frequently seen by Dr. Muchow with regard to the corporate matters (R. 261).

(c) Syndicate operates the mining property.

About October, 1933, the Chain O'Mines was no longer operating the gold mines. At that time, it leased the gold mines for the purposes of operation, to a syndicate of men called the "Chain Syndicate" headed by Dr. Muchow, former president of plaintiff who resigned to take over the operation (R. 260) as shown by Plaintiff's Exhibit 33, dated September 30, 1933 (R. 277-288). The Chain

O'Mines was then indebted to various creditors in an aggregate of over $400,000.00, which sum it was unable to pay. In return for a certain cash consideration paid and in return for certain other promises made by the Syndicate the Chain O'Mines leased the gold mine properties to the Syndicate for the purpose of operation (R. 285).

The Syndicate operated the gold mines from October, 1933, until February, 1934. At that time the Syndicate operation collapsed because the operation proved to be unprofitable. Various first lien claims consisting of labor liens and electric power liens amounting to a total of approximately $95,000.00 were due and unpaid by the month of February, 1934. (Suit to foreclose such liens had been filed, and trial was held on February 17, 1934 (R. 867)). The Syndicate had reduced certain of the indebtedness of the plaintiff corporation by obtaining $18,000.00 from stockholders of the Plaintiff Corporation or members of the Chain Syndicate, and reduced the sum of $32,000.00 by conversion of debts against the plaintiff into units of the Chain Syndicate which in turn became Chain O'Mines stock (R. 225).

(d) Kremm again asked for assistance by Muchow.

Of the $18,000.00 that came from stockholders, that included $100.00 from Defendant Kremm (R. 225). In February, 1934, the Board of Directors of Plaintiff Corporation defaulted the Chain Syndicate for its failure to comply with the provisions of the leasing contract. At that time the operations of the gold mines were entirely stopped.

At that time Dr. Muchow and Miss Hart attempted to have the Board of Directors reinstate the lease. Miss Hart went to all of the members of the Syndicate to reinstate the lease. She approached Defendant Kremm (R. 213) and asked him for help.

After the cancellation of the Syndicate lease Muchow also approached Kremm with regard to reinstating the Syndicate lease or arranging a similar agreement (R. 261). Sometimes both Miss Hart and Muchow were present (R. 213) and these meetings were very frequent. Miss Hart showed Kremm the record of the Syndicate operation and the Syndicate earnings in an attempt to persuade him to assist them in the reinstatement of the Syndicate lease. Dr. Muchow also submitted records to Kremm (R. 261).

On February 19, 1934, the labor lien suits in Gilpin County came on for trial. Evidence was taken for several days. On March 17th, 1934, the Trial Court entered a decree in favor of the lien claimants and against the various defendants, including the Plaintiff Corporation, Miss Hart and Dr. Muchow and Herbert Munroe as Trustee under the bond issue, finding in substance that the valid liens on the property amounted to approximately $97,000.00 including costs and that such liens took a preference over all claims, including the bond issue of $300,000.00. Under the Colorado law, the judgment creditors under this lien decree could avail themselves of immediate possession of the gold mine properties (R. 903).

From the time of the entry of this decree on March 17, 1934, until sometime in May, 1934, Defendant Kremm, together with Dr. Muchow and Miss Hart, working with stockholders, etc., attempted to raise money with which to satisfy this labor and power lien or to work out some arrangement whereby the properties would not be taken in satisfaction of this labor and power lien. These attempts were unsuccessful.

At that time it appeared to all individuals interested in the properties that the lien claimants could not be paid and that, accordingly, the properties would be lost by virtue of the sheriff's sale.

Meanwhile the failure of Plaintiff Corporation to pay *taxes* for certain of its properties had resulted in the sale of certain valuable properties under the tax claims. On May 5, 1934, tax deeds were to be issued by the County Treasurer of Gilpin County which would forever foreclose the right of Plaintiff Corporation to redeem these particular properties from the sale for the failure to pay such taxes. The plaintiff, prior to May, 1934, had attempted to raise the sum of $552.87, for redemption purposes but the attempts to raise money were unsuccessful. On May 4, 1934, Kremm was advised of these new difficulties. He loaned to the Corporation the sum of $552.87, under a contractual arrangement with regard to the making of a conveyance of these particular gold mining properties and arrangements for the subsequent repurchase by the plaintiff from Kremm of these properties, whereby Kremm would make a profit. The details of this are shown by Plaintiff's Exhibit 2 (R. 82-83).

This money was sent to Herbert Munroe, the Colorado attorney for the Plaintiff Corporation and was tendered to the Treasurer of Gilpin County who refused to accept the tender. Munroe advised the Corporation that he thought he could defeat the issuance of these tax deeds by a suit at law for which suit he would require $100.00 retainer and $50.00 costs. The only Corporation money available was money on deposit with the Compensation Insurance Bureau of Colorado. Munroe was instructed to use such proper balance of this fund for the purposes of the suit.

Kremm assisted Miss Hart and Dr. Muchow. He wrote letters to the Board of Directors, he took a place on the Board of Directors, telling Miss Hart that he was doing so to help the syndicate because he felt that he would thereupon be more powerful in his talk with the Directors (R. 213). He wrote letters to the trustees, to the stockholders, in order to get financial help for the Syndicate. It was their

belief at that time that if they could raise money for the labor lien, the Board would reinstate the defaulted Syndicate lease (R. 213).

(e) Kremm's attempts to avoid loss of properties by Chain O'Mines.

On May 8, 1934, Kremm was reelected to the Board of Directors of Chain O'Mines (R. 84). He was informed by Ottenhoff, the then president of the Plaintiff Corporation, of his election and replied by letter dated May 11, 1934, wherein among other things he stated that he had no operation proposal to make at the time; that he was a stockholder and a creditor; that he knew the Company was in dire straits; that he might become interested in one of the various devices that might be set up to salvage or conserve the properties or possibly in an operating company; that the facts would be disclosed at an appropriate time and that at any time his position on the Board became inconsistent with any other interest he might have, he would tender his resignation (R. 85).

Plaintiff's Exhibit 5 (R. 90), which is the minutes of Board of Directors' meeting of the Plaintiff Corporation, of May 11, 1934, indicates the internal friction existing at that time. George Ottenhoff the president, forwarded his letter of resignation. After considerable discussion this resignation was accepted. The resigning president's bill of $662.44 for money paid out-of-pocket by the resigning president was approved by the Corporation, but there was no money available for payment and the resolution merely stated that it be given the earliest possible consideration and paid as soon as the money was available. The Corporation was then also without an office, due to Ottenhoff's resignation (R. 92-93). Dr. Muchow presented a lengthy proposal for a new operating agreement, including the formation of a group of lien-buyers to settle the labor lien situation, if possible. A committee was appointed by the

Board to go over said proposal and make recommendations to the Board. The committee consisted of Dr. Potts, Defendant Kremm and Mr. Wm. H. Stevenson, vice-president of the Corporation.

On May 12, 1934, there was a special meeting of the Board of Directors at the office of Kremm (R. 87). The committee appointed the previous day had not yet completed its work. A discussion was had before the full Board with regard to the proposed amendments. This discussion lasted four hours. The proposed new agreement used the old leasing agreement, *i. e.*, to the Syndicate, as a guide. Considerable discussion was had as to the terms of the operation agreement. Dr. Muchow offered a resolution to reinstate the Chain Syndicate lease, stating that the Syndicate was not in default at the time of the forfeiture. This was opposed by the other Directors, even though Dr. Muchow insisted that he had to have a resolution to reinstate the Syndicate immediately as he was being sued by Syndicate members and would have 114 suits on his hands if the resolution was not immediately acted upon. DuBuclet replied to Muchow. The committee agreed to work on this matter on the next day.

On May 14, 1934, another meeting of the Board of Directors of the Plaintiff Corporation was held (R. 94). The committee had not completed its work and a general discussion was had before the Board on the various committee suggestions. Defendant Kremm discussed before the Board the new McKeown Act, (*i. e.*, federal legislation for relief of financially embarrassed corporations) with the view that the provisions of the Act might be applicable to the case of the Company's present condition if a Court could be shown a good operating lease agreement with some record of operation. Dr. Muchow again requested that the Syndicate lease be reinstated. The secretary advised the Board that the lease could not be reinstated with-

out ratification by the stockholders, and suggested that a new lease be made out to three individuals which lease could be later assigned. Dr. Muchow insisted that the time necessary for calling a meeting for ratification by stockholders would mean too much delay. The Board was unanimous in agreeing that the mill should again be put into operation, but that even if the Syndicate lease was reinstated, the Syndicate had no funds to start immediate operation. Defendant Kremm offered a motion to reinstate the lease with the Chain Syndicate. DuBuclet stated that as far as the Chain O'Mines was concerned, the Syndicate was a nonentity, being composed of a number of co-partners, many of whom were in dissension and litigation among themselves; that the Board of Directors had no guarantee that the Chain Syndicate as a group would assume the responsibility of the leased contract even if reinstated or would carry out such an agreement, and urged that the Board should not get into a complicated situation. Whereupon, Defendant Kremm amended the resolution and moved that the Syndicate lease of September 30, 1934, with amendments prepared by a committee, be reinstated subject to the acceptance of the original lessees or their assigns, without prejudice to either parties of the leased contract. This resolution was carried; Defendant Kremm voting aye and Director DuBuclet being the only "no".

The committee working on the amendments to the lease were to again meet.

(f) Filing of bankruptcy petition against Chain O'Mines.

Approximately at that time Defendant Kremm discussed with Potts, one of plaintiff's leading stockholders, the possibility of filing a petition for the Corporation under Section 77B of the Bankruptcy Act or other methods to save the plaintiff. Kremm suggested it. Potts agreed that if

it were possible to save the plaintiff, he was in favor of that—"any port in a storm" (R. 198).

About May 17, 1934 Kremm and Stevenson, the acting president of the plaintiff, wired $200.00 to Attorney Williams in Denver, Colorado to obtain a postponement of the sheriff's sale under the labor and power lien decree for a period of five days. Williams rejected the offer (R. 942). On or about May 18, 1934, Kremm called Dr. Muchow to his office and discussed with him the filing of a bankruptcy petition. He suggested that such petition be filed immediately, and asked Muchow to procure the three creditors for the petition (R. 269). Two former employees of the Chain O'Mines, *i. e.,* Miss Smith and Miss Jackson, who had claims against the Chain O'Mines were brought to the office. Miss Hart was also called to Kremm's office. He informed her that there wasn't any use in trying to help the Syndicate any further; there was one thing to do and that was to go into bankruptcy (R. 214).

Miss Smith and Miss Jackson endorsed their notes to employees of Kremm (Beatty and Kress) without any consideration passing.

On May 19, 1934, a petition in bankruptcy against the Chain O'Mines, Inc., was filed wherein Miss Kress, Mrs. Beatty, Pages J. Thibodeaux and Defendant Charles L. Schwerin signed as creditors (R. 209). [This petition was dismissed for want of prosecution on October 1, 1936, R. 211.]

During the day of May 18, 1934 Kremm attempted to arrange with a Chicago bonding office to have a bond furnished through its Denver agent in the event the ancillary bankruptcy proceedings in Denver took place.

On May 19, 1934, Dr. Muchow conferred with Kremm in his office and was informed that Kremm was going to Denver to make arrangements with regard to the labor and

power liens (R. 269). Kremm advanced Dr. Muchow money for that trip (R. 829).

(g) Kremm attempts to get best terms for Chain O'Mines from Lewison (Williams).

Kremm and Muchow came to Denver, Colorado. Kremm interviewed numerous attorneys in Denver, in an attempt to determine among other things, the possibility of ancillary proceedings in bankruptcy (R. 269).

After that Kremm and Muchow went to Central City, Colorado. Kremm conferred with Leroy Williams, the attorney for Edward Lewison (R. 269-270). Lewison had an interest of approximately $62,000.00 in the $97,000.00 judgment. Williams demanded at least $48,500 to sell his client's interest. The parties conferred at length. Kremm mentioned the petition in bankruptcy against Chain O'Mines (R. 930) and mentioned the filing of an ancillary petition in Denver as an inducement for settlement. In discussing matters which were advantageous to his side of the deal (R. 931) he said that a bankruptcy proceeding had been taken but they were temporarily holding it (R. 931). Discussion was had back and forth in arriving at terms for the purchase of the Lewison interest. An agreement subject to approval by Lewison was arrived at between Kremm and Williams as confirmed by the terms of a letter sent to Kremm by Williams dated May 21, 1934, Plaintiff's Exhibit 10 (R. 119-120).

In substance this letter provided that in the event Lewison and the Public Service Company of Colorado obtained a sheriff's certificate of purchase from the sale to be held May 22, 1934, Edward H. Lewison would make a contract to assign to Kremm all his interest for the sum of $48,500.00, payable $5,000.00 down and $5,000.00 bi-monthly thereafter with a provision for liquidated damages, and a further provision that in the case of failure to make any

payment after the first payment, there should be a grace period of thirty days during which the contract could be reinstated upon the payment of the sum of $5,000.00. This letter also provided that Kremm would cause no writ of error or review to be taken by the Plaintiff Corporation from the judgment and decree in favor of Lewison.

Kremm and Muchow returned to Chicago.

Kremm showed this letter to the Board of Directors prior to June 19, 1934 (R. 118).

(h) Directors' meeting of May 29, 1934.

On May 29, 1934, another meeting of the Board of Directors of the Plaintiff Corporation was held (R. 97) Muchow was present. At that meeting Stevenson acting as chairman, informed the Board of Directors of the pending bankruptcy proceedings against the Corporation, and after discussion, a resolution was passed authorizing Kremm to employ his counsel to represent the Corporation, and file an answer in the bankruptcy proceeding and to obtain a continuance. The Board also passed a resolution granting Dr. Muchow certain easements over the Chain O'Mines' properties. Kremm reported at length on his trip to Colorado and the negotiations entered into (with Williams) to effect a settlement of the labor situation on an installment payment plan basis. A subscription plan to give the stockholders and other investors of the Company an opportunity to assist in meeting the payments of this plan for the safe-guarding of their own interests and for the removal of a menace to the Company's existence created by the sheriff's sale in satisfaction of the Lewison judgment was presented for approval by the Board. Upon motion of DuBuclet, it was unanimously resolved that the Board of Directors of the Chain O'Mines approve the property recovery subscription plan and give every cooperative assistance possible and consistent with the position

of the Board. The Board was of the united opinion that if the investors of the Company failed to respond to this plan and save their own interests, then the Board would have exhausted its over-handicapped means and tenacious efforts to save the properties of the Company. Arrangements were made by the Board with regard to paying off certain labor claims by means of the operation of the mill to "run through" ore that had been mined under the Syndicate operation and had been lying awaiting the milling.

(i) Kremm attempts to raise cash from stockholders.

After this, various meetings were held by the individuals prior to June 19, 1934, in which tentative forms of a proposed agreement were discussed (R. 106). Certain conferences were held between Kremm and John S. Grimson, a stockholder and one of the members of the voting trust of the stockholders of Chain O'Mines, Inc., with regard to the matters of the Plaintiff Corporation needing funds to try to pay the labor lien, and various other pressing needs that would make it possible to continue operations of Chain O'Mines.

Prior to June 13, 1934, there had been conferences running over a period of time with the object in view of attempting to get various stockholders of Chain O'Mines to contribute moneys in an effort to lift the labor liens independent of any contract (R. 141). Grimson, on June 13, 1934, contributed the sum of $100.00 which was recognized as being very small compared to the amount needed. Grimson urged Kremm not to go ahead unless there was enough money in sight to start operations in addition to providing for the labor lien payments and with reasonable assurance that operations could be continued. Plaintiffs' Exhibit 17 (R. 141).

This attempt to raise money from the stockholders was unsuccessful. The total funds received on this subscription

plan were under $500.00. Accordingly the check was returned to Grimson. Plaintiffs' Exhibit 16 (R. 140).

During that time Kremm made trips out of Chicago accompanied by other officers, directors or stockholders, of plaintiff, in an attempt to raise money from stockholders. All these attempts were unsuccessful.

Shortly prior to June 19, 1934, Kremm, together with Stevenson and Dr. Muchow (R. 107) had prepared drafts of a suggested contract of installment payments. This suggested contract was also discussed with Grimson (R. 142). Kremm told Grimson that Seeley and Schwerin were to be his associates in connection with a contract that was to be finally executed (R. 142).

2. June 19, 1934 to Organization of Central City.

(a) Directors' meeting of June 19, 1934.

On June 19, 1934, there was a special meeting of the Board of Directors, Plaintiffs' Exhibit 8 (R. 100-106). Muchow was again present. At that meeting Kremm reported that he had caused an attorney to file an answer for the Plaintiff Corporation in the bankruptcy proceedings. The company had no funds to pay for the transfer fees of stock to which the Syndicate was entitled.

Kremm was heard on a proposal to the Chain O'Mines, Inc. He stated that his counsel had advised that after the sheriff's sale it was impossible to sell or lease the Company before redeeming and paying off the labor lien judgment, and that since insufficient funds had come in from the appeal to the stockholders to meet the first payment due June 22, 1934 (*i. e.*, under the Williams proposal for Lewison) to attorneys for the Lewison judgment, that he had a proposal to make. Kremm then outlined the plan for one, L. M. Seeley to assume the payment plan heretofore entered into with LeRoy Williams, whereby Seeley would

acquire the sheriff's deed under the Lewison judgment, and for a consideration of issuing certain stock in the Chain O'Mines, Inc., agrees to mortgage said properties for two million dollars in favor of Chain O'Mines as shown in full by Plaintiffs' Exhibit 9. After discussion, a resolution was adopted which is set out *in haec verba* at R. 104-105. The so-called contract agreement of June 19, 1934, is Plaintiffs' Exhibit 9 found at R. 108-116.

The Board also agreed to call a stockholders meeting for the formal ratification of this agreement when Lewison and his attorney Williams would have agreed to the assignment of the labor lien installment payment plan to L. M. Seeley or assigns.

When Seeley's name was discussed at the meeting, some of the directors wanted to know who he was. Kremm thereupon left the room and returned with an individual whom he introduced as L. M. Seeley, his associate (R. 107).

Stevenson had met Seeley a day or two previous to June 19th, after he had met Schwerin in Kremm's office. On that occasion Kremm introduced Seeley to him in a formal way as an associate in the proposed contract with Chain O'Mines (R. 202). The first that Stevenson knew that Seeley's name was to appear in the contract was at the last of the conferences that Stevenson had with Kremm on June 19, 1934, *prior* to submitting the contract to the meeting of the Board of Directors (R. 203).

The model of that contract, according to Stevenson, was the defaulted Chain Syndicate contract as modified to meet new conditions (R. 202).

After Seeley left the room, further discussion was had among the Board of Directors as to the form of the document. Kremm wanted to reduce the royalties, extend the time, reduce the interest rate, but the Board overruled that (R. 107). A request was made for further time to get

advice of counsel, but it was shown that the matter was very pressing and the deal would be off if the contract was not signed. A vote was taken and the contract was accepted (R. 107). That evening the document was signed by Plaintiff Corporation and apparently L. M. Seeley (R. 115).

After the signing of the document DuBuclet saw Kremm on June 21, 1934. At that time there was a discussion about the document. DuBuclet stated that the contract seemed very weak to him and that it could hardly be called a contract. He further stated to Kremm that it seemed to him nothing more than a gentleman's agreement, and Kremm agreed that it was just that and that "if we make good we will take care of the stockholders" (R. 118).

Kremm then wanted Dr. Muchow to go to Central City. He was glad to do it, and to help Kremm get the operation started in Colorado. An agreement was made between Kremm and Muchow that Muchow would go ahead, hire some men, get the operation ready, and that Kremm would follow shortly thereafter. Muchow in Central City got things in order by the time Kremm arrived about two or three weeks after this meeting. Kremm came to Denver on June 20th or 21st and met Williams. At that time Kremm showed Williams the document, Plaintiffs' Exhibit 9, and asked to have Lewison sign it. Williams agreed to make two changes in the original offer as stated by him in his letter of May 21st, 1934. Upon Kremm's representation that he could not get the plaintiff to agree to discontinue the writ of error or appeal that requirement was struck out. Also the requirement that Lewison was not obligated to turn over certain collateral, *i. e.*, stocks and bonds of the Chain O'Mines, Inc., was changed and these securities were turned in to the escrow along with the other papers. This escrow between Lewison and Seeley was Defendant's Exhibit 4, drawn up June 22, 1934 (R. 908-913).

(b) Kremm persuades Schwerin to invest in gold mine by loaning money.

Kremm had been acquainted with Schwerin since 1928. He had had various business dealings with him in 1934, and for sometime prior thereto in connection with various business matters. The first time that Kremm had any conversation with him with respect to the Chain O'Mines property was sometime in April of 1934. At that time Schwerin loaned Kremm a small amount of money (R. 951).

The first time Kremm had talked to Schwerin seriously about any plan to *operate* the gold mine properties was around June 15, 1934. At that time Kremm had told him of the failure of all the Corporation plans, and discussed the possibility of Schwerin investing money in a speculative business. Schwerin suggested several people as sources of money. Kremm investigated them. They did not materialize and Kremm returned to Schwerin. He discussed with him Plaintiff's Exhibit 10, Williams' letter of May 21, 1934. Kremm refused to accept $5,000 from Schwerin or on his behalf as a personal loan, but stated the investment had to be on a risk basis as risk money (R. 952).

Kremm showed Schwerin a draft of Plaintiffs' Exhibit 9 around June 17th. Kremm told Schwerin that he needed between $20,000 and $25,000 capital to operate the mine.

Kremm pointed out that $25,000 was needed to start the operation (R. 959). Kremm observed that some two millions of dollars had been spent on the Chain O'Mines properties, which had been used for development costs and which gave rise to questionable asset value. He pointed out to defendant Schwerin that bidders at the sheriff's sale held on May 22, 1934, had placed a value of $100,000 on 55 of the 1100 claims owned by Chain O'Mines, Incorporated, by bidding that amount for the 55 claims, which were

the most valuable claims. He mentioned that a complete mill was located on these valuable claims (R. 959). He expressed the opinion that the most valuable right was the right to operate the property without harassment from creditors. A contract for the acquisition of the sheriff's certificates which had been issued would carry with it the right to operate the 55 claims and the mill for a sufficient period to determine if the property actually had merit. If the property had merit, he estimated that the purchase of the certificates could be paid out of proceeds from mining operations. If the property produced returns which were adequate to pay the cost of acquiring the sheriff's certificates, the operating corporation would then be obligated to give a $2,000,000.00 mortgage on the property acquired. This was of no concern to Kremm because the amounts to be paid under the mortgage amounted to nothing more than the fixing over 25 years of a reasonable royalty (R. 960). (Insertion ours: Mining operations frequently pay substantial royalties for long periods of years, and that it is common practice to capitalize such royalties on an annual percentage basis.) He mentioned further that the plan involved some hazard, but that the hazards were not disproportionate to the possibilities for tremendous profit.

Schwerin agreed to cooperate with Kremm in raising the capital which Kremm wanted to start the operation. Because of the delay and uncertainty involved under the then recently enacted Securities Exchange Act in attempting to sell stock, an initial $23,000.00 was raised in the form of loans secured by ore warrants (R. 965). These ore warrants were made payable in nine months from the date of execution and delivery, and constituted a *prior claim* on ore to be extracted from the operation. Such security for repayment was based on the belief of Kremm that potential returns from the mining operation had been accurately stated by Dr. Muchow. Had that been true, there

would have been no difficulty in paying these ore warrants which never were liquidated.

(c) Kremm and Seeley go to Denver and confer with owners of Sheriff's Certificates.

When Kremm and Seeley came to Denver to meet Williams on June 22, 1934, Kremm informed Williams that the June 19, 1934 (Plaintiffs' Exhibit 9) document spoke for itself, that Seeley had with him a check for $5,000.00, that he did not know yet where the remainder of the money was coming from, but that they were ready to go ahead with the purchase as outlined in the memorandum agreement. Williams at first refused to sign the agreement, *i. e.*, Plaintiffs' Exhibit 9, stating among other things that he did not intend to join in any agreement with which Chain O'Mines was a party, that then Williams signed the escrow agreement found as Defendant's Exhibit 4 on June 23, 1934 (R. 954).

Around June 22, 1934, Kremm, Muchow and Seeley met with officials of the Public Service Company of Colorado, the owner of approximately 32/97ths of the lien judgment. He tried to negotiate for the purchase of the Public Service Company's interest in the sheriff's certificate, showing Seeley's $5,000.00 check. They replied that they didn't wish to have any agreement in which the Chain O'Mines or its officers were involved, except to sell to them for cash; that they had some obligation to Mr. Williams to work in concert with him but they would sell their interest in the purchase certificate only for cash. The Public Service Company never signed this agreement of June 19, 1934. They told Kremm to raise twenty to twenty-five thousand dollars for working capital for the operation and then come back to talk with them further (R. 956).

(d) Kremm returns to Chicago. Attempts to raise additional $20,000. Stockholders and corporation fail.

Kremm returned to Chicago about June 26, 1934, and met with Stevenson, Dr. Muchow and Grimson. He reported what he had done, the difficulties that he had with the Public Service Company, and that the real problem now was in raising the rest of the money over the $5,000.00 within the next 25 or 30 days; that if he could raise sufficient capital to begin working operations that he could arrive at some agreement with the Public Service Company (R. 956).

On June 27, 1934, Williams was paid the $5,000.00 by L. M. Seeley (R. 914).

Kremm during the next several weeks interviewed various individuals including stockholders of the Chain O'Mines, Inc., in attempts to obtain funds for the gold mining operations to be conducted by the corporation to be formed.

Dr. Muchow in preparing the so-called Property Recovery Fund had estimated for the sum of $13,000.00 as working capital for the resumption of the operations of the property. Kremm at all times had insisted that between $20,000.00 and $25,000.00 was necessary. In working upon Muchow's Property Recovery Fund in an attempt to collect $13,000.00, Kremm solicited subscriptions from the stockholders. He called upon the leading stockholders and various outside people under an arrangement that if a definite amount of money were not received within a fixed period he would return the subscriptions. Under that arrangement he had collected less than $500.00. Kremm was not

furnished with any money by the Chain O'Mines or the Board of Directors or officers (R. 946, 948).

This is the background of the "contract" relied on by petitioners as proving the fraud, with these practically undisputed facts established by the record the Circuit Court of Appeals came to the conclusion that there was no conspiracy to defraud the petitioners.

We submit that the decision of the Circuit Court of Appeals *was* and *is* correct.

REPLY TO PETITIONERS' ARGUMENT.

Alleged Misconception of Trial Court Decree.

1. At pages 18 to 27 petitioners argue that the Circuit Court of Appeals misconceived the decree of the trial Court. They attempt to prove this contention by referring to the use by the Circuit Court of Appeals of the words "temporary phase," "refinancing project," "property would be restored to it upon the floating of this mortgage."

But the word "float" is not a word of art. It was not used by the Circuit Court of Appeals in any technical or "artistic" sense as claimed by the petitioners. This is also true of the words "temporary phase" or "refinancing project."

Further, examination of the opinion of the Circuit Court of Appeals and of the context in which these words were used indicates that that Court *correctly* interpreted the intention of the parties for the "contract" was nothing more than a temporary phase, that is to say, an attempt to hold the lien foreclosure in *status quo* pending the raising of additional money, which meant that the contract involved a refinancing project.

The parties had considered prior to that time the question of the Chain O'Mines taking its property, provided sufficient money could be realized to pay for the pressing liens. But no money could be raised by the Chain O'Mines or its stockholders *i. e.*, the property could not be restored to the Chain O'Mines because there was no proper refinancing.

But assuming for the sake of argument, that the Circuit Court of Appeal's misconceived the decree as claimed

by the petitioners, how would that *tend* to prove FRAUD? It would simply tend to show that the Chain O'Mines at one time was entitled to different contractual rights than that considered by the Circuit Court of Appeals; but this would not constitute a showing of any fraud.

We must also recognize that the so-called contract of June 19, 1934, was extremely vague and general in its terms. There was no date set for its execution. It was *never* signed by the Public Service Company of Colorado. There is even some question as to whether or not *Lewison* was ever bound by the provisions of the contract.

In addition, Chain O'Mines, its stockholders, and its directors, treated the contract as very "weak," for they all recognized that in essence it was merely an *attempt* to obtain money. The contract was never considered as a certain guarantee of the financial security of the Chain O'Mines. It was recognized that the *only* way the Chain O'Mines could profit or the only way that it could be rescued from the financial morass would be *if* the gold mining properties could be operated at a profit. The fact *is* that the properties were always operated at a financial loss. The parties never went through with the contract. The Chain O'Mines abandoned the contract and gave it up as lost in 1934.

The fact that nothing was done about filing suit until 1937, approximately three years later corroborates our contentions.

2. At pages 23-24, petitioners state that they don't know when the conspiracy to defraud began and that "no outsider knows." Nevertheless, the petitioners, in their complaint, seemed to know the time when the conspiracy began, and the trial court found that the conspiracy began on the specific date of May 8, 1934 (R. 1054). It does make a difference in the law suit when the petitioners contend that the conspiracy began because, by

rule of law, if the conspiracy did not exist on May 8, 1934, it could not exist *ex post facto.*

In re Prima Brewing Co., 98 Fed. (2nd) 952, 965; *Sobin* v. *Frederick,* 236 Mich. 501, 211 N. W. 71, at 74.

3. At page 25 petitioners attempt to criticise certain statements of fact made by the Circuit Court of Appeals. Petitioners are in error.

(a) Petitioners err when they state that the mortgage had been eliminated by the decree in the foreclosure of the labor and power liens, because the decree in that case provided simply that the said $300,000 mortgage was *junior* and *subordinate* to the said liens (See R. 894). The mortgage was also subordinated to various other judgments (See R. 894, 873, 875).

(b) Petitioners err when they say that the labor and power liens were pressing only in accordance with the contract in which defendants had agreed to acquire them. The labor and power liens were pressing from the time the suit to foreclose them was begun. Petitioners fail to recognize that the meaning of the Circuit Court of Appeals was the emphasis upon the "*pressing,*" regardless whether it was in accordance with the contract or by virtue of the decree of foreclosure. The fact is that $97,000 in cash was demanded by the lien holders, and unless the respondents had provided cash required by the terms of the contract with the lien holders all of the property would *again* be forfeited to such lien holders. The history of the legal plans and devices used to pay the $5,000 a month clearly illustrates the desperate nature of the finances of the respondents for, in order to meet the $5,000, it was necessary to make repeated agreements for extensions, to make repeated agreements for payment in installments, to borrow money at the bank, to assign ore warrants, to exchange checks and various other measures

made necessary by the lack of moneys. Similarly the moneys needed to pay for the operating costs had to be raised in this desperate fashion.

(c) Petitioners err when they state that the mining operations were profitable. The record shows that the operations under Kremm, Kollie, the Lundorff Bicknell of Cleveland, the Central City Company and the United Gilpin Corporation—all of these operations failed to make a profit. Kremm and Kollie were not paid any salary. The Lundorff Bicknell Company could not produce sufficient tonnage per month to enable the properties to be operated at a profit. The Central City Company operated at a "paper loss." United Gilpin Corporation had a "paper profit" for two years, but the last month of operation indicated a "paper loss." The record discloses that the "paper profit" of the United Gilpin Corporation was typical of gold-mining profits because it was "a paper profit" only because there was no proper deductions for taxes, no proper deductions for salary, depletion, depreciation and the like. There was no provision for interest on capital advancements. With strict accounting expenditure there would not even have been the existence of a "paper profit."

(d) Petitioners err in stating that the stockholders could not "stand by." When Kremm had first tried to raise money from the stockholders in order to meet the terms proposed by Lewison or his attorney he could not even raise the sum of $1,000. The minutes of the board of directors meeting of the Chain O'Mines indicated that they could not even reimburse the corporate president for moneys paid out of pocket (R. 92).

The fact is that the stockholders of Chain O'Mines had then already learned by bitter experience what the respondents to their financial detriment were to similarly experience.

A reading of the minutes of the Board of Directors' meetings graphically illustrates the essential fact strongly relied on by the Circuit Court of Appeals: Chain O'Mines was financially wrecked *before* the respondents were approached. See Plaintiffs' Exhibits 4 (R. 87), 5 (R. 90), 6 (R. 94), 7 (R. 97), 8 (R. 101), 11 (R. 121), 12 (R. 124), 13 (R. 126).

Alleged Misconstruction of Illinois Law.

This is pp. 24-32 of the brief.

1. Apparently petitioners are urging first, that the Circuit Court of Appeals failed to follow the Illinois law with regard to reimbursement upon restitution; second, failed to follow the Illinois law concerning the nature of evidence necessary to prove the existence of a constructive trust, and, third, failed to follow the substantive provisions of Illinois law with regard to the various kinds of fraud. We say that the reading of the opinion of the Circuit Court of Appeals and the cases cited therein conclusively shows that the Court not only felt bound to follow the Illinois decisions but also cited such decisions in its opinion and applied such rules of the Illinois law therein formulated to the facts in the case before them (R. 1139-1141).

2. The petitioners under this heading are simply trying to argue that the Circuit Court of Appeals erred in applying the applicable rules of law to the facts. This is *not* the same as saying that the Circuit Court of Appeals has decided a question of local law in a way in conflict with applicable local decisions. The Circuit Court of Appeals purported to follow the Illinois law. It applied the Illinois law in finding there was no fraud. It followed the Illinois cases in holding that in any event, the respondents were entitled to any credits for moneys advanced for the benefit of the "so-called *cestui.*"

3. At page 30 petitioners apparently are attempting to argue that the Illinois law is that in order to establish a constructive trust the rule that proof must be clear and convincing applies only to where the proof offered is "parole" testimony. Apparently petitioners assume that parole means "oral." This conception, of course, is erroneous, for parole means *both* "oral" and "written."

N. W. Co. v. *Sloan,* 232 Ill. App. 266, 269;
Kine v. *Tobyhenna Ice Co.,* 240 Pa. 61, 87 Atl. 278, 279;
Coleman v. *St. Paul Lumber Co.,* 110 Wash. 259, 188 Pac. 532, 537.

In our case, of course, the evidence *was* both oral and written.

4. In addition petitioners err in failing to recognize that the rule requiring such convincing proof in cases of attempts to impose a constructive trust applies to *all* kinds of proof, both oral and written.

Additional Illinois authorities which clearly support the statement of the rule given by the Circuit Court of Appeals and where the Illinois Supreme Court reverses findings of fact made by the Chancellor below on the ground that the facts fail to establish such *unmistakable* proof of constructive trust within the meaning of this rule are as follows:

Johnson v. *Lane,* 369 Ill. 135, 148, 149;
Sharp v. *Bradshaw,* 367 Ill. 526, 527, 528;
Hogg v. *Eckhardt,* 342 Ill. 246, 254, 255.

5. With regard to the case of *Morris* v. *Flenner,* 25 Fed. (2d) 211, cited by petitioners at pages 31-32, petitioners fail to recognize that the question there involved was a question of *fraudulent conveyance, i.e.,* conveyance made with intent to hinder or defraud creditors. Although the Court does not refer to the Statute in its opinion,

nevertheless, the decision is under the provisions of the Illinois statute relating to fraudulent conveyances.

See:

Ill. Rev. Stat. 1939, Chap. 59, Sect. 4, p. 1726.

The question of fraudulent conveyance does not arise in our case.

6. At page 32 petitioners for the *first* time suggest that the respondents are bound to "account for and pay over the difference of the consideration over and above the liens discharged." (This point was not raised in the petition for Certiorari.)

The facts indicate that the value of the properties at a million and a half dollars over the liens was an optimistic exaggeration. When the property was sold for $97,000 to satisfy labor and power liens, the lien claimants were substantially the only bidders at such sale, and they obtained the property by turning in their liens for it. The stockholders for the Chain O'Mines refused to advance any cash.

The Chain O'Mines lost its property because it was financially destroyed, prior to the entry of the respondents into the operations. The respondents practised no fraud upon it. The respondents tried to operate the property as best they could, continually advancing additional money. In advancing such additional sums of money they tried to secure such advances by taking security interests. They are entitled to keep the security interests. The petitioners have never offered to reimburse the respondents for the moneys advanced by them. The record conclusively discloses that they never will be able to make such offer of reimbursement.

Alleged Conflict in Decisions.

7. At page 32 petitioners refer to a conflict with *In Re Country Club Corp.*, 91 Fed (2d) 13) another decision by the same Court on the same question. But there is no conflict. The *Country Club* case was a bankruptcy case in which the master's findings were apparently approved by the referee, and then approved by the District Court. The facts there were apparently *without* any dispute. The decision of the Court on the facts before it was correct. The Court may have been in error in citing a "law case" as its reason for its refusal to disturb the finding of fact in a bankruptcy case, but the decisions we have cited, *supra*, in our brief indicate that the Circuit Court of Appeals in the instant case followed the correct rule of law with regard to reviewing evidence on an equity appeal.

The Alleged Fraud.

At pages 33-34 the petitioners refer to the case of *People* v. *Small*, 319 Ill. 437. But petitioners carefully omit the leading Illinois case, *Tribune Co.* v. *Thompson*, where considering the question of proving a "conspiracy to defraud" by circumstantial evidence, the Supreme Court of Illinois recognized that although a conspiracy may be proved by indirect or circumstantial evidence, it says:

> "Such evidence must be clear and convincing and if the facts and circumstances relied upon are *as consistent* with innocence as with guilt, it is the duty of the Court to find that a conspiracy has *not* been proved and to enter a decree dismissing the bill for want of equity (citing cases)," 342 Ill. at page 529. (Italics ours.)

To the same effect see:

Fernandina Co. v. *Peters,* 18 Fed. (2d) 277, 278;
Hensch v. *Ormond,* 1 Fed. (2d) 206, at 208.

It is well settled law that if the facts and circumstances relied upon to show conspiracy by circumstantial evidence are as consistent with innocence as with guilt, it is the duty of the Court to find that a conspiracy has *not* been proved. The evidence must do more than raise a suspicion! It *must* lead to belief.

Nissen v. *Andres,* 178 Okla. 469, 43 Pac. (2d) 47, at 51;
Ballantine v. *Cummings,* 220 Pa. 621, 70 Atl. 546, at 550;
Nester Johnson v. *Goldblatt,* 265 Ill. App. 188, at 201;
Henrici Co. v. *Alexander,* 198 Ill. App. 568, at 574.

The plaintiff's evidence does not even raise a suspicion of fraud. At the very least, it was not clear and convincing. As a matter of Illinois law the Circuit Court of Appeals did exactly what the Illinois Supreme Court would have done under the same facts and circumstances, namely, rule that the decree should be reversed and the cause remanded with instructions to dismiss the complaint.

Review of Evidence.

The evidence in the main is not conflicting, contrary to petitioners' statement on page 34. The question was one of drawing inferences as to the motive or motives of the defendants. The opinion of the Circuit Court of Appeals indicates that the Court analyzed the voluminous evidence for itself; it carefully weighed and considered the evidence and the reasonable inferences that could be drawn there-

from. It came to the conclusion that the trial judge had erred in drawing the inference that fraud had motivated respondent's conduct and accordingly it reversed his decree. That conclusion was and is correct.

The 2 patent cases cited by petitioners at page 35 are not in point. Prior to discussing them, we briefly refer to *Corona Card Tire Co.* v. *Dovan Chemical Corp.*, 276 U. S. 358, a patent case, where this Court held that even though the trial court made a finding for one party on conflicting evidence, yet, where the Circuit Court of Appeals has reversed such finding, the Supreme Court in later reviewing the facts is *not* bound by the ordinary rule in patent cases that findings of fact by the trial court based upon conflicting evidence are not assailable (276 U. S. at 375).

In the *Adamson* case, the Circuit Court of Appeals had reversed the trial court decree on the basis of a *fixed rule of law.* This Court finding *contrary* to this fixed rule of law, then considered the facts on the basis of the rule cited and quoted by the petitioners.

In the *Davis* case the Master and the District Court had made findings of fact based upon conflicting evidence, *i.e.*, the "two-court rule." The appeal was directly to the United States Supreme Court from the United States District Court. In the case at bar the evidence in the main was undisputed, but the inferences to be drawn therefrom may have differed under the decision of this court. The Circuit Court of Appeals was under the law authorized and obligated to examine both the law and the facts and to consider the appeal *de novo.*

Contrast the facts in these two patent cases with the facts in our record. The "will of the wisp" profit in gold mining ventures has lead many business men to financial ruin.

An analogous "gold mining investment" case where the court held that investment in "gold mines" did not constitute a "fraud" is *Bowyer* v. *Boss Tweed Clipper Gold Mines*, 195 Wash. 25, 79 Pac. (2nd) 713. There, as in this case the parties who had suffered a financial loss in *their* investment sought to hold other investors liable for such loss. There, as in this case the reviewing court set aside the chancellor's findings, holding that defendants were *not* guilty of a conspiracy to obtain possession of a gold mine by "fraud". The facts are substantially similar to the case at bar. *This* case is a precedent. It is in favor of the respondents.

See also a reversal of the chancellor's finding in the "nature" of a "conspiracy"—*In Re Prima Brewing Co.*, 98 Fed. (2nd) 952, 964, 965 (C. C. A. 7, cert. den. in 305 U. S. 658).

CONCLUSION.

Wherefore, United Gilpin Corporation, a corporation, *et al.*, respondents, respectfully pray that the petition for certiorari herein be denied.

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